FILED
United States Court of Appeals
Tenth Circuit

March 8, 2012

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: BRADLEY N. FROST, Movant.	No. 12-5020 (D.C. Nos. 4:08-CV-00620-SPF-TLW & 4:05-CR-00001-SPF) (N.D. Okla.)

ORDER

Before **LUCERO**, **EBEL**, and **O'BRIEN**, Circuit Judges.

Bradley N. Frost, proceeding pro se, moves for authorization to file a second or successive 28 U.S.C. § 2255 motion challenging his convictions (Northern District of Oklahoma case no. 4:05-CR-00001-SPF-2) for embezzling from a health care benefit program, in violation of 18 U.S.C. § 669, and money laundering. We deny authorization.

Section 2255(h) places strict limitations on second or successive § 2255 motions. Such a motion cannot proceed in the district court without first being authorized by this court. *See id.* § 2255(h); *id.* § 2244(b)(3). This court may authorize a claim only if the prisoner makes a prima facie showing that the claim relies on (1) "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing

evidence that no reasonable factfinder would have found [him] guilty of the offense"; or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* § 2255(h); *see id.* § 2244(b)(3)(C).

Mr. Frost relies on the "new evidence" test, § 2255(h)(1), arguing that the prosecution changed its theory of the case during his first § 2255 proceeding. His argument involves identifying what entity satisfied the requirement, for a violation of 18 U.S.C. § 669, that there be a "health care benefit program." The indictment stated that Mr. Frost's company, Heritage National Insurance Company (HNIC) was a health care benefit program. *See United States v. Redcorn*, 528 F.3d 727, 734 (10th Cir. 2008). Mr. Frost asserts that at trial, however, the government took the position that HNIC's contracts, not HNIC, were health care benefit programs. Then, during the § 2255 proceedings, the prosecution initially claimed that HNIC was a health care benefit program, before once again switching to the position that HNIC's contracts were health care benefits programs. He argues that this change of tactics presents new evidence to invalidate his conviction, because "the government now admits that I am imprisoned for a 'theory' never presented at trial." Mot. for Auth. at 1.

In their joint § 2255 proceeding, Mr. Frost and his co-defendant argued that counsel was ineffective for failing to challenge on appeal whether HNIC was a health care benefit program. In determining that defendants were not

prejudiced by counsel's performance, the district court concluded that HNIC qualified as a health care benefit program. *See United States v. Redcorn*, Case Nos. 05-CR-001-SPF, 08-CV-620, 08-CV-636, slip op. at 10 (N.D. Okla. Mar. 4, 2009) (unpublished order). This court affirmed, explicitly holding that HNIC qualified as a health care benefit program. *See United States v. Frost*, 355 F. App'x 230, 233-34 (10th Cir. 2009). Accordingly, Mr. Frost was not convicted on a theory not presented in the indictment or to the jury. Nothing in his motion for authorization tends to show that he can satisfy the requirements of § 2255(h)(1).

The motion for authorization is DENIED. This denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court,

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk